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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

A divided panel of the United States Court of Appeals for the Second Circuit affirmed a judgment of the District Court for the Southern District of New York dismissing an action brought by petitioner Bankers Trust Company pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, on the ground that a civil claim for damages under RICO will not lie if plaintiff's injuries were caused by the criminal acts through which defendants' enterprise was conducted.

The Court of Appeals' decision presents the following questions:

Does RICO provide a civil remedy for a person injured by the conduct of an enterprise through a pattern of racketeering activity if his injury is caused by some of the criminal acts through which the enterprise is operated?

PARTIES TO THE ACTION

Petitioner, plaintiff below, is Bankers Trust Company ("Bankers"). A list of Bankers' parent company, subsidiaries and affiliates is set forth in the Appendix to this petition for a writ of certiorari ("App.") at App. 135.

The respondents, defendants below, are set forth in the caption. They are Milton Braten ("Braten"), an officer and principal shareholder of Braten Apparel Corporation ("BAC"); Daniel Rhoades ("Rhoades"), an officer of BAC and an attorney for BAC and Braten; Herman Soifer ("Soifer"), a shareholder of BAC; and a number of entities owned and controlled by the individual respondents.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Bankers Trust Company, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 26, 1984, on the ground that this case presents an issue of substantial importance as to which there is a conflict in the courts of appeals.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are reproduced at

App. 3 and 18. The decision of the district court, reported *sub nom. Bankers Trust Company v. Feldesman*, 566 F. Supp. 1235 (S.D.N.Y. 1983), is reproduced at App. 33.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the court of appeals was entered on July 26, 1984. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§ 1961 *et seq.* (1978), are reproduced at App. 128.

STATEMENT OF THE CASE

A. Summary of Facts

Respondents' unlawful conduct is appalling. As the dissent below said, "if civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." (App. 19)

Bankers' complaint describes a plethora of criminal activities committed by the individual respondents in their thus-far successful effort to retain monies loaned by Bankers to Braten Apparel Corporation ("BAC"). The respondents' racketeering activities began in 1974, in preparation for BAC's fraudulent bankruptcy, and continued through and after BAC's bankruptcy proceedings, with numerous bankruptcy offenses and other abuses of the judicial system, including corruption of a state judge.

The acts of bankruptcy fraud committed by respondents between 1974 and 1976 enabled BAC to obtain, in 1976, a discharge in bankruptcy of the debt owed to Bankers. That discharge, however, was revoked by the bankruptcy court in 1982 after a trial at which the individual respondents' fraud

was proven. Some of those acts of bankruptcy fraud are detailed in the opinions of the bankruptcy court and district court in *In re Braten Apparel Corporation*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 B.R. 1009 (S.D.N.Y.), *aff'd*, September 1, 1983 (n.o.r.) (2d Cir. 1983).

Despite the order of revocation and the findings of fraud, Bankers remained unable to collect its claim. During the trial in the revocation case, respondents committed another series of bankruptcy offenses, again fraudulently transferring and concealing the valuable assets of BAC.

Respondents have used a network of corporations and secret trusts to defraud and attack legitimate businesses for ten years, through the series of offenses described below. Their illegitimate profits have been manipulated, through various channels, to enrich the individual respondents and to finance new schemes. Remedies usually effective against ordinary businesses and businessmen have proved worthless against respondents' readiness to flout the law. If RICO does not provide a remedy here, it never will.

B. Summary of Argument

The district court expressly found (App. 41), and the court of appeals did not question, that Bankers had alleged all the elements of a violation of RICO's section 1962. The district court also found that the respondents' alleged actions "strongly suggest a sinister scheme to defraud [Bankers] and other creditors of the monies they lent." (App. 46). The court of appeals agreed that Bankers was injured in its business by the respondents' conduct. (App. 13)

Based upon the language of the statute and Congress' underlying purposes, Bankers clearly stated a claim under RICO's private civil remedy provision, 18 U.S.C. § 1964(c). Nonetheless, the majority below concluded that Bankers could not sue. The majority held that injury caused by the criminal acts through which an enterprise is operated is not remediable under RICO. Rather, the majority concluded, there had to be some "distinct" injury caused by the "pattern" of those acts.

Bankers submits that the court of appeals erred in three respects and that its ruling will, unless reversed, destroy RICO's private civil remedy and thwart Congress' intention in enacting RICO.

First, section 1962(c) prohibits the *conducting* of an enterprise through a pattern of racketeering activities—to consider the "pattern" to be the targeted offense, as the majority below did, misconstrues the statute's language and purpose. Congress' target was not abstract patterns. Section 1962(c) was aimed at people who conduct enterprises through two or more enumerated criminal acts. To permit victims of such acts to sue only for indirect or "distinct" injuries caused by the "pattern" cuts the heart out of the statute.

Second, even assuming the "pattern" of acts could be deemed the offense, no real distinction can be drawn between, on the one hand, injuries caused by the criminal acts and, on the other hand, injuries caused by the "pattern" consisting of those acts.

Third, in any event, the majority below erred in imposing a mechanical rule that one injured by acts of racketeering activity cannot also be deemed to have been injured by the "violation" of section 1962(c).

The Second Circuit's decision conflicts with decisions of at least three other courts of appeal (the Fifth, Seventh and Eighth) and of numerous district courts, which have upheld civil RICO claims based on injuries resulting directly from racketeering activities. Moreover, the federal courts have split into at least four different camps in attempting to define the injury remediable by RICO. A ruling from this Court is necessary to eliminate the current chaos and permit RICO to be given its intended scope and effect.

C. The Facts of This Case

(i) *The Bankruptcy Frauds—1974-77*

In August 1974, at a time when BAC owed Bankers more than $4 million, defendants Braten and Soifer (and others)

began their scheme to put BAC into bankruptcy and obtain a discharge of its indebtedness, while preserving its most valuable assets for themselves. They agreed that Soifer would assume the apparent ownership of BAC's principal asset—a recently acquired wholly-owned subsidiary with a net value of $3.4 million named Brookfield Clothes, Inc. ("Brookfield"). After Soifer assumed the apparent ownership of Brookfield, BAC would seek reorganization under Chapter XI of the then-applicable Bankruptcy Act of 1898 and, upon discharge of BAC's indebtedness, Soifer would return Brookfield to BAC.

To implement the scheme, a sham agreement was executed making it appear that BAC had lost Brookfield to Soifer. The misrepresentations (to the creditors and to the bankruptcy court) about the ownership of Brookfield continued throughout BAC's proceeding, including, *inter alia,* in BAC's Chapter XI petition, in testimony given by the individual respondents, in financial statements distributed to BAC's creditors, and in other sworn and unsworn documents and statements. These numerous acts of bankruptcy fraud are outlined in the majority opinion below (App. 6-8). As a result of these offenses, Bankers and the other creditors were induced to accept, and the bankruptcy court was induced to confirm, a Chapter XI plan of arrangement under which BAC was relieved of more than $4.3 million in debt.

Within a few months of the confirmation of BAC's plan of arrangement Soifer returned Brookfield to BAC, and Soifer, Braten and Rhoades constructed a network of corporations and other entities through which BAC's assets were distributed.

When some of these facts began to surface, Bankers commenced a proceeding to revoke the confirmation of BAC's arrangement on the ground that it had been fraudulently procured. See 11 U.S.C. § 786 (1976). Following a lengthy trial, on June 25, 1982 the bankruptcy court expressly found that BAC's bankruptcy proceeding had been infected with fraud—fraudulent transfer, fraudulent concealment, false testi-

mony and sworn pleadings—and revoked the order of confirmation. *In re Braten Apparel Corp.*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982). This decision was affirmed by the district court, 26 B.R. 1009 (S.D.N.Y. 1983), and the district court's decision was affirmed by the Second Circuit.

The revocation order restored to Bankers its claims against BAC. Respondents, however, had perpetrated yet another scheme to frustrate collection of that debt.

(ii) *The Bankruptcy Frauds—1982*

In its June 25, 1982 decision revoking BAC's fraudulently procured confirmation, the bankruptcy court stated that BAC should offer to its creditors a new and "realistic" plan "in light of the fact that the debtor owns a valuable asset—Brookfield." *In re Braten Apparel Corporation,* 21 B.R. at 263. The bankruptcy court, however, had been deceived again. After the revocation trial had concluded, but before the decision was rendered, respondents had embarked on a new scheme designed once again to shield BAC's assets from creditors, and to frustrate the coming adverse finding by the bankruptcy court.

The new scheme was similar to the earlier scheme—respondents stripped BAC for a second time of the stock of Brookfield. This time, however, respondents went one step further to insulate the assets—they stripped Brookfield itself of assets.

In January 1982, one of the corporations controlled by the individual respondents obtained almost $9 million from KB Business Credit, Inc. ("KBBC"), and disbursed these funds to several of the corporate respondents herein. When KBBC was not repaid, it sued Braten, Rhoades and several of the corporate respondents. Respondents settled the lawsuit (and avoided personal liability) by having BAC, for little or no consideration, convey the stock of Brookfield to another of respondents' corporations, which then pledged the stock to KBBC.

At or about that time, Brookfield itself was stripped and its assets disbursed to the respondents. Brookfield had been

phenomenally successful, had paid out millions of dollars to the other respondents, and still had a substantial equity in early 1982. However, shortly after the bankruptcy court rendered its revocation decision in June 1982, Brookfield was found to be insolvent. Thus, respondents had taken no chances that BAC's creditors would be able to reach Brookfield or its assets; they conveyed away Brookfield and stripped it of its assets.

(iii) *The Bribery*

During the period 1974-1976, respondents and their affiliates instituted a series of frivolous multi-million dollar lawsuits against Bankers in New York State court, designed to hinder Bankers' collection of the debt owed to it.

Although those New York suits were still pending, in 1977 BAC commenced a similar action against Bankers, this time in South Carolina. In another South Carolina proceeding, Braten asserted claims, adverse to Bankers, to certain escrow funds. Rhoades was of counsel to a South Carolina law firm representing BAC and Braten in both South Carolina cases.

While these cases were pending before Judge William H. Ballenger, Rhoades used a South Carolina corporation formed by him to purchase or assume a defaulted mortgage on which Judge Ballenger was personally liable to the extent of $100,000. Judge Ballenger rendered decisions favorable to BAC and Braten, including: (1) appointing a former partner of the South Carolina attorney to whose firm Rhoades was counsel as special referee in the escrow action, with the power to deprive Bankers of a jury trial, and (2) denying Banker's motion to dismiss BAC's $195 million damage action.

After the transactions involving Rhoades' corporation and the Judge's corporation came to light, the Judge recused himself from the escrow action, citing a possible conflict of interest, the special referee resigned, and the Judge's denial of Bankers' motion to dismiss BAC's damages action was reversed as an abuse of discretion. Bankers had expended over $100,000 in legal fees in those cases.

D. This Action

Bankers commenced this action under RICO in August 1982, shortly after it was discovered that, notwithstanding the bankruptcy court's June 25, 1982 revocation of BAC's fraudulently procured confirmation, respondents had again frustrated the bankruptcy process by, again, fraudulently rendering BAC assetless. Before any discovery, the district court dismissed Bankers' complaint on the pleadings, opining that RICO required a "competitive" or antitrust type injury. *Bankers Trust Company v. Feldesman,* 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (App. 44). The Second Circuit disagreed with the district court's reasoning (App. 14n.6), but nevertheless affirmed for different reasons.

FEDERAL JURISDICTION OVER THIS ACTION

This action arises under Title IX of the Organized Crime Control Act of 1970, P.L. 91-452, codified at 18 U.S.C. § 1961 *et seq.* Federal jurisdiction over civil claims arising thereunder is conferred by 18 U.S.C. § 1964(c).

REASONS FOR GRANTING THE WRIT

The issue presented in this case is one of national significance; its resolution will determine whether Congress' goal of combating the organized, systematic criminal conduct infecting our society can be furthered by private parties, such as Bankers, who have been victimized by such conduct. This Court's decision will also resolve multiple conflicts among the lower federal courts as to the scope of civil RICO.

The primary purpose of RICO is not in question—"the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 104 S.Ct. 296, 302 (1983). Included in this arsenal, and potentially the most forceful weapon of all, is a provision permitting victims of

RICO violations to sue in federal court to recover treble damages for their injuries. 18 U.S.C. § 1964(c). This provision has never before been considered by this Court.

Congress, faced with a widespread and multi-faceted problem, drafted RICO in broad terms, and directed that RICO "shall be liberally construed to effectuate its remedial purposes." P.L. 91-452, § 904(a). Congress was aware of the far-reaching implications of RICO's civil scope; nevertheless, "Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship." *Schacht v. Brown*, 711 F.2d 1343, 1354-55 (7th Cir.), *cert. denied sub nom. Arthur Andersen and Co. v. Schacht*, 104 S.Ct. 508 (1983).

The Second Circuit, alone among the circuits that have considered RICO's private civil remedy, has in effect concluded that because RICO is being used in circumstances the Second Circuit deems to be inappropriate, its use will be prohibited in virtually every case.

During the week of July 23, 1984, the Second Circuit filed opinions in three civil RICO cases.[1] In *Sedima, S.P.R.L. v. Imrex Company, Inc.* (App. 48) the majority (Judge Cardamone dissenting) held that a civil RICO claim could only be brought for "mobster" type injury. The majority in the instant case, by contrast, held that RICO's civil remedy did not apply unless the victim's injury was wholly independent of any injury caused by an "act of racketeering activity." A unanimous panel in *Furman v. Cirrito* (App. 107) disagreed with the previous two decisions, but abided thereby. *Furman v. Cirrito* also revealed that the Second Circuit had *sua sponte* considered and denied rehearing *en banc* of these cases (App. 109). Taken

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1 Along with this petition, petitions for certiorari are being filed in the other two civil RICO cases decided by the Second Circuit, presenting similar questions for review.

together, the three decisions reveal a serious dispute within the Second Circuit as to the meaning and breadth of civil RICO.[2]

In the instant case, and in *Sedima*, the Second Circuit engrafted onto the statute a set of irrational and insurmountable obstacles to the use of civil RICO. The Second Circuit's decisions find no support in the language or history of the statute. In the words of the panel in *Furman v. Cirrito*, the standing requirements adopted in *Sedima* and in this case would "sterilize civil RICO as a weapon against the conduct Congress sought to curtail." (App. 119)

No other court of appeals has erected such barriers to civil RICO claims, and several other circuits have sustained RICO actions that could not pass muster under the Second Circuit's formulation. There is little doubt that the Fifth, Seventh and Eighth Circuit Courts of Appeals would give Bankers its day in court on the facts of this case. Just four days ago, the Seventh Circuit expressly repudiated the Second Circuit decisions in this case and *Sedima*, holding, "We adhere to our prior decisions and those of other circuits, and we reject the Second Circuit's imposition of a racketeering injury requirement. We conclude that a civil RICO plaintiff need not allege or prove injury beyond any injury to business or property resulting from the underlying acts of racketeering." *Haroco, Inc. v. American National Bank & Trust Company*, No. 83-2529 (7th Cir. Oct. 19, 1984), slip op. at 28.

For these reasons, as amplified below, Bankers respectfully submits that this case presents a critical issue deserving of review by the Supreme Court.

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2 The Second Circuit's decisions have generated massive confusion at the bar, typified in a front page article in a popular legal periodical—The National Law Journal, August 13, 1984, page 1, col. 3: "A RICO CRISIS—2d Circuit Rulings Sharply Curb Civil Actions; Lawyers See Confusion Until High Court Acts."

I.

THE SECOND CIRCUIT'S STANDING REQUIREMENTS FIND NO SUPPORT IN THE LANGUAGE OR HISTORY OF THE ACT

The majority below acknowledged that Bankers was injured by respondents' conduct (App. 13). Nevertheless, the majority concluded that Bankers was not injured, within the meaning of section 1964(c), "by reason of a violation of section 1962".

The principal RICO violation alleged by Bankers is defined in section 1962(c):

> "*to conduct or participate*, directly or indirectly, in the *conduct* of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." (emphasis added)

The civil remedy of section 1964(c) provides:

> "Any person injured . . . by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate district court and shall recover threefold the damages he sustains. . . ."

Thus, if the unlawful *conduct* of the enterprise caused injury, the victim has a remedy under section 1964(c). *See, Haroco, supra*, slip op. at 28.

The majority below, however, adopted a requirement of "distinct RICO injury" which eviscerates the statute. The court held that it was not sufficient that the injury was caused by the conduct of the enterprise in an unlawful manner. Rather, the court held, only injuries somehow caused exclusively by the "pattern of racketeering activity",[3] as distinct from its constituent acts of racketeering activity, are covered by RICO. The majority went on to impose an absolute bar to suit under

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3 The "pattern of racketeering activity" is defined merely as "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5).

RICO when a plaintiff's injury is caused by acts of racketeering activity:

> "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury." (emphasis in original) (App. 16)

The majority, we submit, ignored the statute. RICO is violated by the *conduct* of the enterprise through a pattern of racketeering activity, not by the pattern itself. The majority mistakenly elevated the "pattern", merely one element of a RICO violation, to the status of the violation itself by holding that only injuries caused by the pattern are covered by RICO. In effect, the majority changed the language of section 1964(c), "[a]ny person injured . . . by reason of a violation of section 1962 may sue . . .," into

> "[a]ny person injured . . . by reason of a *pattern of racketeering activity, no part of whose injury is directly caused by a racketeering activity,* may sue. . . ."

Moreover, even under the majority's view that the RICO violation is the pattern of racketeering activity, the majority still erred. The majority required that the acts of racketeering activity themselves not be a direct cause of the victim's injury, apparently assuming that an injury caused by the "pattern" is separable from injuries caused by acts of racketeering activity *and* that the two varieties of injury are mutually exclusive. Thus, even if an injury is caused (under ordinary theories of causation) by the pattern of predicate acts it cannot be redressed under RICO if the injury is also deemed caused by the predicate acts themselves.

The majority was wrong. There is no real difference between injuries caused by a pattern of racketeering activities and injuries caused by the racketeering activities themselves, and the two "classes" of injuries are certainly not mutually exclu-

sive. As stated in *Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120 (1982):

> "Courts that differentiate between injury from the operation of an enterprise through a pattern of predicate offenses and injury from the predicate offenses themselves create an artificial distinction: the victim of either is the victim of both."

That the majority's distinction between the two kinds of injury is artificial is apparent from its attempt to illustrate the kind of injury to which, it says, RICO's civil remedy is limited:

> "For example, a plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of the fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts." (App. 16-17)

The majority would find the arsonists free from RICO civil liability for the buildings they intentionally destroyed; they would be liable only for the uninsured damage caused innocently, *e.g.*, by a bolt of lightning. Thus, if arsonists burned down six buildings, each valued at a million dollars, neither the landowner nor his insurance company (his subrogee) could sue the arsonists under RICO for the six million dollar loss. But if a now-uninsured seventh building (worth ten thousand dollars) were destroyed by lightning, the landowner could sue the arsonists under RICO and recover up to thirty thousand dollars. Such a result hardly seems consistent with Congress' intention of taking the profit out of crime.

The majority's second illustration is also revealing: a civil RICO action could be brought by a businessman against people who committed felonies against his customers, causing them to stop dealing with his business, but only if the business-

man were "injured" by having to obtain a loan or take in a partner (App. 17). Apart from other criticisms which may be addressed to this illustration, one stands out: if the defendants had succeeded in destroying the business *entirely*, so that the victim could not obtain a loan or a new partner, the defendants' criminal conduct would not subject them to *any* liability under RICO.

The dissent below also observed that these illustrations demonstrated the shortcomings of the majority's analysis (App. 28-29). For example, a victim's right to sue should not be dependent on fortuitous events or his efforts to help himself (App. 29n.1). The dissent also noted that, by limiting standing to "those whose injuries are caused indirectly":

> "the injuries directly caused by the admittedly 'felonious' acts of a RICO defendant (even a member of La Cosa Nostra) would *not* be subject to the civil sanctions Congress specifically enumerated . . . . Stated another way, even a convicted Mafia defendant could escape civil liability for the harm done his intended victim under the majority's reasoning." (emphasis in original) (App. 28-29).

Undoubtedly, RICO's civil damage remedy should cover injuries indirectly caused by the defendants' conduct of their enterprise, as described by the Second Circuit, such as uninsured fire damage or interest paid on a loan. But Congress could not have intended that RICO's civil remedy permit recovery *only* for such indirect or accidental fragments of a victim's injuries, while not permitting recovery for serious damage directly caused by the criminal operation of the enterprise. As the Seventh Circuit said in *Haroco, supra* (slip op. at 27), rejecting the majority opinion below:

> "[B]y restricting civil RICO to such indirect injuries as those discussed in the opinion's examples, and by denying RICO claims for the injuries resulting from the extended pattern of racketeering activity in that case itself, *Bankers Trust* reduces RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts."

The language of the statute does not support the majority opinion below. As this Court has held, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States v. Turkette*, 452 U.S. 576, 580 (1981).

Section 1964(c) imposes no requirement of a "special" kind of injury, much less one which is "indirectly" caused by or "distinct" from the acts of racketeering activity. *See Furman v. Cirrito* (App. 115). Not only does the statute omit any such limitation but Congress directed that the provisions of RICO be "liberally construed to effectuate its remedial purposes" and, as noted in another context, Congress intentionally employed broad terms in order to implement RICO's intended breadth. *Russello v. United States*, *supra*, 104 S.Ct. at 300. Thus, the plain language of RICO permits the victim to sue for injuries resulting from the conduct of an enterprise through a pattern of racketeering, whether or not those injuries are "indirect" or "distinct" from the injury caused by the acts of racketeering activity.

The legislative history contains nothing that suggests a contrary interpretation of the statute. RICO's legislative history is long and complex. However, certain matters are indisputable.

First, Congress intended to create new tools and weapons to deal with the problems of organized criminal activity. *See*, Statement of Findings, 84 Stat. 922-23; S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). Congress was well aware that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." *United States v. Turkette*, *supra*, 452 U.S. at 587 (reviewing the legislative history).

Second, while Congress' principal target was "organized crime," it knew that RICO would extend to more prosaic criminal activities. Bankruptcy fraud was included as a predicate racketeering act in the earliest versions of the statute and Congress later extended the list of predicate acts to include mail fraud, wire fraud and securities fraud. *See*, S. 1623, 91st

Cong., 1st Sess. (a predecessor of RICO), 115 Cong. Rec. 6995-96 (1969); S. Rep. No. 617, *supra*. *See also*, 116 Cong. Rec. 18,913-14 (1970) (Remarks of Senator McClellan) (pointing to the difficulty of drafting a bill to reach all the activities of organized crime and yet not reach offenses commonly committed by persons outside organized crime).

Third, Congress intended that RICO be used to take the profit out of crime. *United States v. Turkette*, *supra*, 452 U.S. at 591-92 and authorities cited therein; *Russello v. United States*, *supra*, 104 S.Ct. at 302-03 (profits, income and economic power of criminals are a principal target of RICO).

Fourth, RICO's private civil remedy (section 1964(c)) was not intended to be limited by complicated or obscure requirements of "standing" or "proximate cause". Versions of the private civil remedy were proposed at least as early as 1967, when Senator Hruska introduced S. 2048 and S. 2049, 90th Cong., 1st Sess. (1970), which would have amended the Sherman Act to reach organized criminal activity. *See*, 113 Cong. Rec. 17,999 (1967) (Statement of Sen. Hruska). However, the Antitrust Section of the American Bar Association argued against placing the civil remedies in the Sherman Act, arguing that the use of the antitrust laws:

> "could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with the body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.' " 115 Cong. Rec. 6995 (1969).

Senator McClellan's proposed S. 30, which did not include a private civil remedy, passed the Senate in January 1970, and went to the House for consideration. The American Bar Association recommended amendments including a private treble damage action. Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 538, 543-44 (1970); 116 Cong. Rec.

25,191 (1970). This amendment was adopted by the House Judiciary Committee, and recommended to the House by Congressman Poff. 116 Cong. Rec. 35,295.

House Judiciary Chairman Celler, speaking in support of the bill, specifically noted the private civil remedy provision, 116 Cong. Rec. 35,196 (1970), and the bill overwhelmingly passed. 116 Cong. Rec. 35,344 (1970). As the ABA urged, RICO's private civil remedy was not made part of the antitrust laws. The amended bill returned to the Senate, which accepted the House amendments, including section 1964(c). 116 Cong. Rec. 36,296 (1970).[4] The President, who had earlier urged the inclusion of a private civil remedy, signed the bill on October 15, 1970. 116 Cong. Rec. 37,264 (1970).

In summary, Congress passed RICO in an effort to purge society of organized criminal activities infecting the nation and its commerce. Because the disease was long-standing and deeply entrenched, the treatment included radical new remedies intended to take the profit out of crime, including treble damage suits by persons victimized by those criminal activities. Clearly, nothing in the language or legislative history of RICO supports the proposition that only victims who had suffered some "distinct" or "indirect" injury could sue. *See also*, G. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 280 (1982).

In light of the above, Bankers submits that the decision of the majority below rests on something other than the language and legislative history of RICO. Rather, when viewed together with the companion decision in *Sedima*, the majority's decision is clearly based either upon an unwillingness to believe that Congress knew the import of its words or upon a concern for a presumed "proliferation" of RICO actions.

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4 Several months earlier, Senator McClellan had apprised the Senate of the ABA's proposed civil damage remedy, and had endorsed it. 116 Cong. Rec. 25,191 (1970).

These concerns are not valid reasons to disregard the plain language of the statute. As the Seventh Circuit concluded in *Schacht*:

> "the legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime." 711 F.2d at 1361.

See also, Turkette, supra, 452 U.S. at 587.

The result which would be achieved here by applying the plain language of the statute is not unreasonable. It is hardly repugnant to the policy of an anti-racketeering statute to permit a suit by Bankers, the victim of "a sinister scheme to defraud" (App. 46). *See, Haroco, supra*, slip op. at 14 n.8. Bankers should be allowed to sue for the damages caused by respondents' conducting their enterprise through a pattern of racketeering activities spanning eight years and two states.

II.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THOSE OF OTHER CIRCUITS

The majority below did not even cite the court of appeals decisions from other circuits construing RICO's civil remedy. No other court of appeals has adopted or applied the majority's theory of a strictly limited "distinct RICO injury." To the contrary, all the circuits that have considered civil RICO claims have interpreted or applied section 1964(c) broadly, permitting claims by plaintiffs whose injury from the violation of RICO has also been caused by one or more of the underlying predicate acts. The Seventh Circuit has expressly repudiated the decision below. *Haroco, supra*, slip op. at 18, 27. In addition, numerous district courts have also rejected the requirement of a "special" or "distinct" RICO injury. The conflict created by the Second Circuit can only be resolved by this Court.

The federal courts have split into at least four camps on the issue of what injury is compensable under RICO.

The other Circuits that have considered this issue clearly would uphold Bankers' right to sue. They have not imposed any arbitrary limitation on the nature of the required injury and many have expressly rejected the theory that RICO's civil remedy is limited to "indirect" injury. In *Haroco, supra*, slip op. at 27-28, the Seventh Circuit said "[t]he injuries for which RICO recovery was denied in *Bankers Trust* are not distinguishable in any meaningful way from those alleged in [earlier Seventh, Eighth and Fifth Circuit decisions upholding RICO claims]," citing: *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); *Bunker Ramo v. United Business Forms, Inc.*, 713 F.2d 1272, 1287-88 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1344, 1358 (7th Cir.), *cert. denied sub nom. Arthur Andersen and Co. v. Schacht*, 104 S.Ct. 508 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir.), *aff'd*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied sub nom. Prudential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983).[5]

Some courts have required a "competitive" or antitrust-type injury, a requirement expressly rejected by the Second Circuit majority below (App. 14 n.6). *See, e.g.*, the district court opinion herein (App. 44).

A few courts, including the majority below, have opted for some variant of "racketeering enterprise injury". *See, e.g.*, the

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5 In *Haroco, supra*, slip op. at 9 n. 6 the Seventh Circuit noted that the Eighth Circuit's position "has been clouded by" *Alexander Grant and Co. v. Tiffany Industries, Inc.*, [1984] Fed. Sec. L. Rep. (CCH) ¶ 91,671 (8th Cir. 1984). There, the Eighth Circuit criticized the concept of "racketeering enterprise injury" as "a slippery concept whose definition has eluded even those courts professing to recognize it"; and expressly rejected the holding of *Sedima*. The *Grant* court nevertheless characterized its decision as "consistent with" *Bankers Trust v. Rhoades* (the majority opinion below), but, at the same time, stated that the *Bankers Trust* injury test is "far narrower" than its own and cited, with apparent approval, the unanimous dissenting opinion of the Second Circuit panel in *Furman v. Cirrito*.

cases cited in *In re Cantanella*, 583 F. Supp. 1388, 1434 (E.D. Pa. 1984).

Finally, some courts have taken positions that do not fit into any of the foregoing categories. *See, e.g., Sedima* (requiring a "mobster" type injury); *Johnsen v. Rogers*, 551 F. Supp. 281, 285-86 (C.D. Calif. 1982) (requiring a "commercial" injury not otherwise compensable by other remedies); *Willamette Savings & Loan v. Blake & Neal Finance Co.*, 577 F. Supp. 1415, 1430 (D. Ore. 1984) ("I know it when I see it").

The highly restricted definition of "distinct RICO injury" created by the majority below is contrary to the holdings of the other circuit courts. As noted above, *Haroco, supra*, expressly rejected the holding in the instant case. In *Bunker Ramo Corp. v. United Business Forms, Inc., supra*, plaintiff's injury was its payment of fictitious invoices, an injury directly caused by predicate acts of mail fraud. The Seventh Circuit sustained the RICO claim. In *Sutliff, Inc. v. Donovan Companies, Inc., supra*, the Seventh Circuit sustained a RICO claim by creditors whose injury, the uncollectability of their extensions of credit, was caused by the predicate acts.

Bennett v. Berg, supra, sustained a RICO claim based on defendants' conducting their enterprise (a corporation operating a retirement village) through a pattern of mail fraud, resulting in a diminution of the value of plaintiffs' contractual rights to live in the village. In considering whether this was the kind of injury appropriate for a civil RICO claim, the Eighth Circuit noted that the essence of plaintiffs' RICO claim was "injury flowing from fraud", 685 F.2d at 1058, and rejected the argument that plaintiffs' injuries were "attributable only to individual acts of mail and wire fraud", holding that this was merely another form of argument as to whether there was an "enterprise". *Id.*, at 1059 n.5.

Alcorn County v. U.S. Interstate Supplies, Inc., supra, upheld a RICO claim where the County's injury was money it was fraudulently induced to pay out. In considering whether the injury fell within the scope of civil RICO the Fifth Circuit

noted that "[m]ost courts have read the 'injury' requirement of section 1964(c) broadly," and held that

> "the injury alleged by Alcorn County in this case, including unauthorized purchases at inflated prices, procured by bribery and threats, and payment for goods never received, falls within the scope of a civil RICO action."

731 F.2d at 1169. Thus, the Fifth, Seventh and Eighth Circuits have held that the plaintiffs could sue under RICO even though their injuries flowed directly from some of the underlying acts of racketeering activity and were not "distinct" from those injuries.

District courts in other circuits have also rejected the approach of the Second Circuit. For example, the district courts in the Third Circuit have consistently rejected a "distinct injury" requirement like that of the majority below in this case. *See, In re Cantanella*, 583 F. Supp. 1388, 1434-1437 (E.D. Pa. 1984); *Kirshner v. Cable/Tel Corp.*, 576 F. Supp. 234, 244 (E.D. Pa. 1983); *Seville Industrial Machinery Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983), *rev'd on other grounds*, No. 83-5575 (3d Cir. September 6, 1984) (available Lexis Genfed library) (such a requirement would "lead to the anomalous result of denying standing to direct victims of racketeering activity"; the complaint was sustained by the court of appeals). Many other district courts throughout the country also expressly reject injury requirements of the kind imposed by the majority below. *See, e.g.*, *Morosani v. First National Bank of Atlanta*, 581 F. Supp. 945 (N.D. Ga. 1984); *Grado v. Gross*, [1984] Fed. Sec. L. Rep. (CCH) ¶ 91,660 (D. Mass. 1984); *Slattery v. Costello*, 586 F. Supp. 162 (D.D.C. 1983); *In re Longhorn Securities Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983); *Ralston v. Capper*, 569 F. Supp. 1575 (E.D. Mich. 1983).

The Second Circuit itself is racked by disagreement on the issue presented in this case, as shown by the dissent below, the unanimous opinion in *Furman v. Cirrito* and by the divergence between the majority opinions in *Sedima* and the instant case.

Indeed, a RICO claim that might pass muster under the majority opinion in *Sedima* would not survive under the majority opinion in the instant case. *See, Sedima*, (App. 73-74), and Judge Cardamone's dissent below (App. 29); *see also, Haroco, supra*, slip op. at 26.

It is evident that a definitive ruling is needed to unify the law and to give the RICO civil remedy its intended scope as a weapon against crime.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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